91

Supreme Court, U.S.
FILED
APR 18 2008
OFFICE OF THE CLERK

No. 07-1193

In The Supreme Court of the United States

KRISTEN DAY, *et al.*,

Petitioners,

v.

RICHARD BOND, Chairman of the Kansas Board of Regents, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICI CURIAE BRIEF OF THE HONORABLE ALAN K. SIMPSON, THE HONORABLE LAMAR S. SMITH, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, in order to establish standing to bring a preemption challenge under 8 U.S.C. § 1623 against a state law granting in-state tuition rates to illegal aliens, a U.S. citizen must also demonstrate that 8 U.S.C. § 1623 creates a private right of action?

2. Whether, in order to establish standing to bring an Equal Protection Clause challenge against a state law that treats illegal aliens more favorably than U.S. citizens in the allocation of a public benefit, a U.S. citizen must demonstrate that he would have received the public benefit even if the discriminatory provisions of state law were invalidated?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE TENTH CIRCUIT ERRED IN DISMISSING PETITIONERS' FEDERAL PREEMPTION CLAIM 9

II. THE TENTH CIRCUIT MISAPPLIED *JACKSONVILLE* IN DISMISSING PETITIONERS' EQUAL PROTECTION CLAUSE CLAIM, AND THUS EXACERBATED A CIRCUIT SPLIT 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Sandoval, 532 U.S. 275 (2001) 11

Boswell v. Skywest Airlines, Inc., 361 F.3d 1263 (10th Cir. 2004) 10

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 11

Day v. Sebelius, 376 F.Supp.2d 1022 (D.Kan. 2005), *aff'd sub nom.*, *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *reh'g denied*, 511 F.3d 1030 (10th Cir. 2007) 4, 9, 11, 13

Friendly House v. Napolitano, 419 F.3d 930 (9th Cir. 2005) 3

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 11

Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007) 3

League of United Latin Am. Citizens v. Wilson, 908 F.Supp. 755 (C.D.Cal. 1995) 6

League of United Latin Am. Citizens v. Wilson, 997 F.Supp. 1244 (C.D.Cal. 1997) 6, 7

Lozano v. City of Hazleton, 496 F.Supp.2d 477 (M.D.Pa. 2007) 3

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 14

TABLE OF AUTHORITIES – Continued

Page

Ne. Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville, 508 U.S. 656 (1993) 13, 14, 15

Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) 10

Reyes v. Van Elk, ___ U.S. ___, 128 S.Ct. 1222 (2008) 2

Sonnenfeld v. City and County of Denver, 100 F.3d 744 (10th Cir. 1996) 11

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 11

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 11

CONSTITUTION

Equal Protection Clause, U.S. Const. amend XIV, § 1 5

STATUTES

Development, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001) 7

Development, Relief, and Education for Alien Minors Act, S. 1545, 108th Cong. (2003) 7

TABLE OF AUTHORITIES – Continued

Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, div. C, title V, 110 Stat. 3009-546 – 3009-724 (1996) (codified as amended in scattered sections of Titles 8 and 18 U.S.C.) 3, 6

Immigration in the National Interest Act of 1995, H.R. 2202, 104th Cong. (1995) 6

8 U.S.C. § 1373 12

8 U.S.C. § 1621 12

8 U.S.C. § 1623 ..... *passim*

8 U.S.C. § 1623(a) 3, 5, 7, 12, 14

8 U.S.C. § 1644 12

Kan. Stat. Ann. § 76-731a 3, 4, 5, 8, 15

Kan. Stat. Ann. § 76-731a(a) 8

Kan. Stat. Ann. § 76-731a(b)(2) 8

RULES

Supreme Court Rule 37(2)(a) 1

AMICI CURIAE BRIEF OF THE HONORABLE ALAN K. SIMPSON, THE HONORABLE LAMAR S. SMITH, AND MOUNTAIN STATES LEGAL FOUNDATION

The Honorable Alan K. Simpson, the Honorable Lamar S. Smith, and Mountain States Legal Foundation respectfully submit this *amici curiae* brief in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amici curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Honorable Alan K. Simpson, United States Senator (R-Wyo.), served 18 years in the United States Senate before retiring in 1997. While in the Senate, he was a member of the Senate Committee on the Judiciary and Chairman or Ranking Member of the Subcommittee on Immigration and Refugee Policy. Senator Simpson graduated from the University of Wyoming Law School, served as Assistant to the Attorney General of the State of Wyoming, served

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amici*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Mountain States Legal Foundation, its members, or its counsel made a monetary contribution to its preparation or submission.

for 13 years in the Wyoming House of Representatives, and was director of Harvard University's Kennedy School of Government. Senator Simpson has an interest in this litigation because he was a Senate cosponsor of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the federal statute at issue in this case. Senator Simpson also submitted an *Amici Curiae* brief on this case before the Tenth Circuit Court of Appeals.

The Honorable Lamar S. Smith (R-Tex.) is serving his eleventh term as United States Representative to the 21st District of Texas and is the Ranking Member of the House Judiciary Committee. Congressman Smith graduated from Yale University and from the Southern Methodist University School of Law. Congressman Smith has an interest in this litigation because he was the primary sponsor of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the federal statute at issue in this case. Congressman Smith also submitted an *Amici Curiae* brief on this case before the Tenth Circuit Court of Appeals.

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has been active in litigation concerning illegal aliens and immigration. *E.g.*, *Reyes v. Van Elk*, ___ U.S. ___, 128 S.Ct.

1222 (2008) (represented *amicus*); *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (represented proposed intervenor-defendants); *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005) (represented intervenor-defendants); *Lozano v. City of Hazleton*, 496 F.Supp.2d 477 (M.D.Pa. 2007) (represented defendant). In fact, MSLF served as attorney of record, preparing the *amici curiae* brief of Senator Simpson and Congressman Smith, in the instant case at the Tenth Circuit below. In addition, MSLF has more than 25,000 members nationally and illegal immigration is a critical issue for many of these members.

SUMMARY OF THE ARGUMENT

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") provides that no state may provide any illegal alien postsecondary education benefits on the basis of residence within the state unless all United States citizens are provided an equal benefit, regardless of their state of residency. 8 U.S.C. § 1623(a). On July 1, 2004, despite federal immigration law, Kansas Statute 76-731a was enacted; it provides that any individual who attended an accredited Kansas high school for three years and who either graduated or earned a general education development certificate, and meets the law's other criteria, is eligible to pay tuition rates equivalent to Kansas resident rates at regents' schools. Kan. Stat. Ann. § 76-731a. Petitioners contend that the statute

unlawfully and unfairly allows illegal aliens to attend Kansas's universities and pay resident, in-state tuition. On July 19, 2004, Petitioners initiated a lawsuit challenging section 76-731a. On July 5, 2005, Petitioners' case was dismissed for lack of standing and for lack of a private right of action. *Day v. Sebelius*, 376 F.Supp.2d 1022 (D.Kan. 2005), *aff'd sub nom., Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *reh'g denied*, 511 F.3d 1030 (10th Cir. 2007). Petitioners appealed the District Court decision to the United States Court of Appeals for the Tenth Circuit. On August 30, 2007, the Tenth Circuit affirmed the District Court. 500 F.3d 1127 (10th Cir. 2007). Petitioners then filed a timely petition for rehearing *en banc*, which was denied on December 17, 2007. 511 F.3d 1030 (10th Cir. 2007). The instant, timely petition for a *writ* of *certiorari* followed.

Kansas Statute 76-731a plainly violates the IIRIRA, 8 U.S.C. § 1623; Kansas grants in-state tuition to certain illegal aliens on the basis of residency, but withholds equal benefits from United States citizens who are out-of-state residents. Even though Kansas has enacted its statute in the face of the IIRIRA, both the District Court and Tenth Circuit held that Petitioners did not have a right to demand the equal treatment mandated by Congress. These holdings are inconsistent with the intent and language of the IIRIRA; thus, *certiorari* is required to vindicate Petitioners' rights as Congress intended. Not only do Petitioners meet all requirements of Article III standing, but they also possess a private

right of action, as provided by Congress in the IIRIRA. Additionally, Kansas Statute 76-731a violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Congress has defined two classes of students who are to receive equal treatment with regards to postsecondary education benefits: illegal aliens whom a state opts to grant in-state tuition and United States Citizens who are out-of-state residents. 8 U.S.C. § 1623(a). Despite the mandate of equal treatment, Kansas does not treat these classes equally, thus violating Petitioners' rights. Additionally, and notwithstanding the Tenth Circuit's decision, Petitioners have standing to bring their equal protection claim because they have suffered an injury that is traceable to Kansas's unlawful statute that would be redressed by a favorable decision. Moreover, in holding that Petitioners did not have standing to pursue their claim, the Tenth Circuit exacerbated an existing Circuit split that only *certiorari* can correct.

ARGUMENT

In 1994, California voters passed Proposition 187, a voter initiative that, among other things, would have prohibited illegal aliens from receiving all but the most essential health and medical services. Proposition 187 was challenged immediately in both

state and federal courts. *See League of United Latin Am. Citizens v. Wilson*, 997 F.Supp. 1244, 1249 n.1 (C.D.Cal. 1997) (listing five actions filed in federal courts in California). Although many of Proposition 187's provisions were ultimately held unconstitutional, its prohibition on granting illegal aliens postsecondary education benefits remained valid. *League of United Latin Am. Citizens v. Wilson*, 908 F.Supp. 755, 774 (C.D.Cal. 1995).

In August 1995, Representative Lamar S. Smith (R-Tex.) introduced into the United States House of Representatives a bill to amend the Immigration and Nationality Act to improve deterrence of illegal immigration to the United States; his bill included language similar to that included in Proposition 187 regarding postsecondary education benefits. Immigration in the National Interest Act of 1995, H.R. 2202, 104th Cong. (1995). On March 21, 1996, H.R. 2202 was passed overwhelmingly in the House by a vote of 333 to 87. In April 1996, H.R. 2202 was placed on the calendar of the United States Senate, cosponsored by Senator Alan K. Simpson (R-Wyo.). On May 2, 1996, the Senate passed H.R. 2202 by a vote of 97 to 3. On September 30, 1996, H.R. 2202 was enacted as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, div. C, title V, 110 Stat. 3009-546 – 3009-724 (1996) (codified as amended in scattered sections of Titles 8 and 18 U.S.C.).

The IIRIRA provides, in relevant part:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. § 1623(a). Thus, Congress did not phrase this statue as an outright prohibition against offering in-state tuition rates to illegal aliens. Rather, Congress drafted the statute in a manner intended to discourage States from providing illegal aliens in-state tuition rates by creating a statutory right to in-state tuition rates for all citizens should a State grant such a benefit to illegal aliens. *Id.*

In 2001 and again in 2003 Congress considered amending § 1623. The Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (2001); The DREAM Act, S. 1545, 108th Cong. (2003). Both proposed bills would have replaced section 505 with a program granting certain illegal aliens postsecondary education benefits. *Id.* Both proposals failed, however. Further, in 1997, the United States District Court for the Central District of California held that § 1623 demonstrated Congress's intent to preempt state law. *League of United Latin Am. Citizens v. Wilson*, 997 F.Supp. 1244, 1256

(C.D.Cal. 1997) (holding Proposition 187's provision regarding postsecondary education benefits pre-empted by federal law).

Despite the federal prohibition on granting postsecondary education benefits to illegal aliens unless an equal benefit is conferred upon all United States citizens regardless of residency, on July 1, 2004, the State of Kansas enacted a statute granting in-state tuition status to certain illegal aliens. Kan. Stat. Ann. § 76-731a. The Kansas statute provides that "Any individual who is enrolled or has been accepted for admission at a postsecondary educational institution as a postsecondary student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance" so long as the student:

> (A) has attended an accredited Kansas high school for three or more years, (B) has either graduated from an accredited Kansas high school or has earned a general educational development (GED) certificate issued within Kansas . . . ; and (C) in the case of a person without lawful immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or person's parents have filed an application to legalize such person's immigration status. . . .

Kan. Stat. Ann. § 76-731a(a), (b)(2).

On July 19, 2004, Petitioners, a group of non-Kansas-resident students and parents of non-Kansas-resident students, initiated the instant challenge to the Kansas statute. Petitioners allege, *inter alia*, that the Kansas statute is preempted by federal law, specifically IIRIRA, 8 U.S.C. § 1623, and that the Kansas statute violates the Equal Protection Clause of the United States Constitution. *Day v. Sebelius*, 376 F.Supp.2d 1022 (D.Kan. 2005).

I. THE TENTH CIRCUIT ERRED IN DISMISSING PETITIONERS' FEDERAL PREEMPTION CLAIM.

The District Court for the District of Kansas, in reviewing Petitioners' claim of federal preemption, held that 8 U.S.C. § 1623 did not vest a private right of action in Petitioners. *Id.* at 1034-1037. Although the District Court assumed Petitioners had sufficient standing to bring their claim, the court held that § 1623 did not give individuals a remedy to enforce immigration laws. The Tenth Circuit took a different tack in its *de novo* review of Petitioners' preemption claim. Instead of assuming standing was proper in its analysis of the private right of action issue, as the District Court did, the court confounded its analysis, and held that, because there was no private right of action, there was no standing. *Day v. Bond*, 500 F.3d 1127, 1135-1139. In fact, Petitioners meet all requirements for Article III standing: they have sustained an injury in fact – increased tuition, despite § 1623's requirement that they be granted in-state

rates; their injury is traceable to Defendants' actions – the Kansas statute plainly violates § 1623; and their injury would be redressed by a favorable decision – the court could require that they be granted in-state status and reimbursed for any excessive tuition paid. Moreover, as outlined below, § 1623 provides a private right of action, regardless. Thus, the Tenth Circuit erred in dismissing Petitioners' preemption claim.

When a plaintiff brings a claim that state law has been preempted by federal law, that plaintiff need not always show that the federal statute provides a private right of action. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) ("A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law."). "A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Id.*

Although *Qwest Corp.* controlled in the Tenth Circuit, that is, no private right of action is required when a plaintiff brings a claim of federal preemption, should this Court require a private right of action, the IIRIRA provided such a right. In determining whether a private right of action exists, courts have emphasized that the "inquiry focuses on the Congressional intent underlying the particular statute at issue." *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004). In determining Congressional intent,

courts focus primarily on a single factor: "whether Congress, expressly or by implication, intended to create a private cause of action." *Sonnenfeld v. City and County of Denver*, 100 F.3d 744, 747 (10th Cir. 1996); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). In determining Congressional intent, courts examine the statute for "rights-creating language," *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), that is, language that "explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("Congressional intent may be discerned by looking to the legislative history and other factors: *e.g.*, the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the state in providing relief."). Courts also look to language identifying "the class for whose especial benefit the statute was enacted." *Cannon*, 441 U.S. at 688 n.9. Language that clearly imparts an "individual entitlement" and has an "unmistakable focus on the benefited class" evinces Congressional intent to create a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002).

In the instant case, the Tenth Circuit, like the District Court, erred in its determination that the IIRIRA did not create a private right of action. *Day*, 500 F.3d at 1138-1139; *Day*, 376 F.Supp.2d at 1035-1037. In enacting the IIRIRA, Congress intended to create a private right of action. Pet'rs App. E at 118a,

¶ 5. The statute "identif[ies] the class for whose especial benefit the statute was enacted," *Cannon*, 441 U.S. at 688 n.9 – those "citizen[s] or national[s] of the United States" attending postsecondary educational institutions, 8 U.S.C. § 1623(a). Further, the statutory text focuses on the benefiting class by providing that, "unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, or scope)," no illegal alien may receive, on the basis of residence, any postsecondary education benefit. 8 U.S.C. § 1623(a).

Finally, Congress carefully drafted § 1623 with the intent of creating a valid, enforceable, private right of action. Pet'rs App. E at 118a, ¶¶ 5-8. Unlike the vast majority of federal immigration law, which is concerned chiefly with the regulation of immigrant and non-immigrant alien activity, the removal of unlawfully present aliens, and the prosecution of smugglers and employers of illegal aliens, § 1623 speaks clearly of benefits to be afforded United States citizens. 8 U.S.C. § 1623(a). Further, § 1623 is one of only three provisions in the Immigration and Nationality Act that regulates the actions of states rather than private persons or entities. *Id.*[2] This unique

[2] The other two provisions regulating states are 8 U.S.C. § 1621 (restricting public benefits for aliens) and 8 U.S.C. § 1644 (providing that communication between state and local government agencies and the Immigration and Naturalization Service shall not be hindered) (an identical provision is also at 8 U.S.C. § 1373).

statutory construction evinces Congressional intent that § 1623 be interpreted differently than other provisions of federal immigration law; that is, § 1623 must be read to create a valid, enforceable, private right of action. Thus, the Tenth Circuit, as the District Court below, erred in holding that the IIRIRA did not create a private right of action in Petitioners.

II. THE TENTH CIRCUIT MISAPPLIED *JACKSONVILLE* IN DISMISSING PETITIONERS' EQUAL PROTECTION CLAUSE CLAIM, AND THUS EXACERBATED A CIRCUIT SPLIT.

As to Petitioners' equal protection claim, the District Court held that Petitioners did not have standing to pursue their claim. *Day*, 376 F.Supp.2d at 1037-1040. Specifically, the court held that Petitioners' purported injuries were not fairly traceable to the Kansas statute and that Petitioners' purported injuries would not be redressed by a favorable decision. *Id.* In its *de novo* review, the Tenth Circuit also held that Petitioners lacked standing to pursue their equal protection claim, *Day*, 500 F.3d at 1132-1136; however, in so doing, the Tenth Circuit misapplied Supreme Court precedent provided by *Northeast Florida Chapter of the Association of General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). In *Jacksonville*, this Court held that it is not necessary for a plaintiff to show that he would have received the sought-after benefit if the challenged law were not in place; simply removing the barrier is sufficient

remedy for standing purposes. *Id.* at 666. Had the Tenth Circuit applied the proper standard, it would have held that Petitioners met all requirements for Article III standing.

As noted above, Petitioners meet all requirements for Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). They have sustained an injury in fact, the increased tuition paid, despite § 1623's requirement that they be granted in-state rates. In addition to Petitioners' economic injury, they have suffered an injury in fact sufficient for an equal protection claim:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . .

Jacksonville, 508 U.S. at 666. Here, Congress has defined two classes of individuals, illegal aliens whom a state grants in-state tuition and all United States citizens who are out-of-state residents. 8 U.S.C. § 1623(a). Moreover, Congress has demanded these two classes of individuals be treated identically for purposes of granting in-state tuition benefits. *Id.*

Despite this mandate, Kansas has erected a barrier to Petitioners receiving equal benefits; Kansas Statute 76-731a mandates that illegal aliens receive a benefit that is not granted to all United States citizens who are out-of-state residents. Kan. Stat. Ann. § 76-731a. Petitioners' injury can be fairly traceable to Defendants' actions because the Kansas statute plainly violates § 1623. *Compare* 8 U.S.C. § 1623 (mandating equal benefits) *with* Kan. Stat. Ann. § 76-731a (providing benefits to illegal aliens only). Finally, Petitioners' injury would be redressed by a favorable decision, as the Court could require that they be granted in-state status and be reimbursed for any excessive tuition paid; thus vindicating Petitioners' economic injury. More importantly, the unlawful unequal treatment would be eliminated; that is, the removal of the unlawful barrier and the return to equal footing for these two classes of people seeking government benefits remedies the equal protection violation, thus vindicating Petitioners' equal protection claim. *Cf. Jacksonville*, 508 U.S. at 666.

CONCLUSION

For the foregoing reasons, and those more fully presented in Petitioners' petition for a *writ* of *certiorari*, this Court should grant *certiorari* to correct the Tenth Circuit's erroneous merger of the standing and private right of action doctrines and to correct the Circuit split regarding the scope of *Northeast Florida*

Chapter of the Association of General Contractors v. City of Jacksonville.

Respectfully submitted by,

WILLIAM PERRY PENDLEY
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amici Curiae

April 18, 2008